83-350

Office-Supreme Court, U.S.
FILED
JUL 18 1983
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM 1982

---

International Studio Apartment Association, Inc., and Royal Coast Condominium Association, Inc., Florida Corporations, not-for-profit,

Petitioner,

vs.

Robert E. Lockwood, Clerk of the Circuit Court, Seventeenth Judicial Circuit of Florida, and Broward County,

Respondents.

---

# APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE SUPREME COURT OF FLORIDA

---

Counsel of Record:
ROD TENNYSON, ESQ.
LEON ST. JOHN, ESQ.,
Powell Tennyson & St. John, P.A.
Counsel for Petitioners
325-C Clematis Street
West Palm Beach, Florida 33401
Telephone: (305) 659-5133

NO. _____

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM 1982

---

International Studio Apartment Association, Inc., and Royal Coast Condominium Association, Inc., Florida Corporations, not-for-profit,

Petitioner,

vs.

Robert E. Lockwood, Clerk of the Circuit Court, Seventeenth Judicial Circuit of Florida, and Broward County,

Respondents.

---

# APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE SUPREME COURT OF FLORIDA

---

Counsel of Record:
ROD TENNYSON, ESQ.
LEON ST. JOHN, ESQ.,
Powell Tennyson & St. John, P.A.
Counsel for Petitioners
325-C Clematis Street
West Palm Beach, Florida 33401
Telephone: (305) 659-5133

TABLE OF CONTENTS

SUPREME COURT OF FLORIDA

Thursday, April 14, 1983

INTERNATIONAL STUDIO APARTMENT ASSOCIATION, INC. and ROYAL COAST CONDOMINIUM ASSOCIATION, INC., A Florida corporation not for profit,

Petitioners,

vs.

ROBERT E. LOCKWOOD, etc., et al.,

Respondents.

CASE NO. 62,979
District Court of Appeal
4th District-No.81-1998

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V., Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla.R.App. P. 9.330(d).

ADKINS, ACTING C.J., BOYD, OVERTON and EHRLICH, JJ., Concur; McDONALD, J., Dissents

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: /s/Kay D. Got
Deputy Clerk

C

cc: Hon. Clyde L. Heath, Clerk
Hon. Robt. E. Lockwood, Clerk
Hon. Barbara Bridge, Judge

Rod Tennyson, Esquire
of Powell, Tennyson & St. John
Alexander Cocalis, Esquire
David Wolpin, Esquire

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 62,979

INTERNATIONAL STUDIO APARTMENTS ASSOCIATION, INC. and ROYAL COAST CONDOMINIUM ASSOCIATION, INC., Florida corporations not for profit,

Petitioners/Appellants,

vs.

ROBERT E. LOCKWOOD and BROWARD COUNTY,

Respondents/Appellees,

_____/

# BRIEF ON JURISDICTION

POWELL, TENNYSON & ST. JOHN, P.A.
Attorneys for Petitioners/ Appellants
325-C Clematis Street
West Palm Beach, Florida 33401
Telephone: (305) 659-5133

TABLE OF CONTENTS

## TABLE OF CITATIONS

## STATEMENT OF THE CASE AND THE FACTS

Petitioners/Plaintiffs sued the Respondents/Defendants in the Circuit Court for Broward County. The trial court entered an order on October 15, 1981 dismissing the case with prejudice. Petitioners/Plaintiffs then filed their appeal to the Fourth District Court of Appeal on October 29, 1981. On November 24, 1982 the Fourth District Court of Appeal affirmed the trial court's decision. See confirmed copy of Fourth District Court of Appeal's Opinion attached as the Appendix.

The action before the trial court was brought to recover interest monies earned on funds deposited in the Broward County Court Registry. The action was a class action brought by two (2) condominium associations on behalf of themselves and other similarly situated persons who deposited funds in the Court Registry. The Defendants were the Clerk of the Circuit Court of the Seventeenth Judicial Circuit and Broward County.

The Plaintiffs' Complaint before the trial court was based upon the recent United States Supreme Court decision in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 445 U.S. 925, 66 L.Ed. 2d 358, 101 Sup.Crt. 446 (1980). In Webb's Fabulous Pharmacies the United States Supreme Court held Section 28.33, Fla.Stat., unconstitutional, holding that the clerk's retention of interest money earned on the principal

deposited with the clerk constituted a taking of private property in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

The Defendants below filed a Motion to Dismiss the Plaintiffs' Complaint for failure to state a cause of action. This motion was heard before any class certification occurred and the motion was directed only to the two named Plaintiffs. The court entered an order on October 15, 1981 granting the motion and dismissing the Plaintiffs' Complaint with prejudice without leave to amend.

The Fourth District in its opinion concluded that the United States Supreme Court's decision in Webb's Fabulous Pharmacies should not be applied retroactively and non-retroactive application did not violate the Fifth Amendment to the United States Constitution. In so ruling, the Fourth District has concluded that even if the clerk's retention of interest money earned constitutes a taking, such a taking does not violate the Fifth Amendment to the United States Constitution:

> In our view, retrospective operation of Webb's Fabulous Pharmacies will neither further nor retard the rule (constitutional protection against deprivation of property without due process), so that the second factor in the Chevron test is similarly satisfied. . . . here as in Lemon even if for the sake of argument a taking is assumed, a constitutional interest is implicated only once and under circumstances that will not reoccur, the statute having been effectively

eliminated. In determining whether non-retroactive application of Webb's will undermine the constitutional interest at stake, it is important to consider the exact nature of that constitutional interest in relation to the present case.

## I. THE FOURTH DISTRICT'S OPINION INTERPRETS PROVISIONS OF THE UNITED STATES CONSTITUTION, INCLUDING THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The main issue of the Fourth District's opinion concerns whether or not the clerk of the court and the county must refund interest earned and whether or not failure to refund these monies constitutes a taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution. In fact, the entire Webb's Fabulous Pharmacies decision before the United States Supreme Court concerned these constitutional principles:

> . . . (the County) may not transform private property into public property without compensation, even for the limited duration of the deposit in the court. This is the kind of thing that the taking clause of the Fifth Amendment was meant to prevent. That clause stands as a shield against the arbitrary use of government power.
>
> 101 S.Ct. at 452.

The Fourth District in its opinion has interpreted the Fifth and Fourteenth Amendments to the United States Constitution not to require a refund of the monies retained by the Clerk and County even in light of the United States Supreme Court's decision in Webb's Fabulous Pharmacies. The Fourth District's interpretation of the Fifth and Fourteenth Amendments

to the Constitution of the United States in light of the Supreme Court's decision in Webb's Fabulous Pharmacies "expressly construes a provision of the state or federal constitution" and thus confers jurisdiction on this Court under Article 5, Section 3(b)(3) of the Florida Constitution.

## II. THE DECISION AND OPINION OF THE FOURTH DISTRICT COURT OF APPEAL EFFECTS A CLASS OF CONSTITUTIONAL OFFICERS.

Section 28.33, Fla.Stat., relating to Clerks of the Circuit Court and their investment of funds deposited in the Court Registry is a statute which applies to all the clerks of the circuit court in the State of Florida. These clerks are clearly constitutional officers under Article 5, Section 16, of the Florida Constitution. The Fourth District's opinion concerns whether or not the United States Supreme Court's decision in Webb's Fabulous Pharmacies, supra, should be applied to the clerks of the circuit courts and whether or not these clerks of the circuit court must refund interest monies to parties who had deposited monies under Section 28.33, Fla.Stat. Therefore, the opinion of the Fourth District "expressly affects a class of constitutional or state officers". Article 5, Section 3(b)(3) of the Florida Constitution. See Taylor v. Tampa Electric Co., 356 So.2d 260 (Fla. 1978).

## III. CONCLUSION

In conclusion, the Florida Supreme Court has jurisdiction to review the Fourth District's opinion should it so desire because the opinion interprets the Fifth and Fourteenth Amendments to the United States Constitution and affects a class of constitutional officers, to-wit: the clerks of the circuit court around the State of Florida. Petitioners would further state that this Court should exercise its jurisdiction and review this case because the issues involve one of the most cherished and fundamental constitutional protections in the United States Constitution. As the United States Supreme Court stated in Webb's Fabulous Pharmacies "that clause [the Fifth Amendment] stands as a shield against the arbitrary use of government power". The Fourth District's opinion basically concludes that if the state or county acts in good faith (i.e. relied upon a statute) when confiscating people's property, then the state or county should be allowed to keep that property even if its activities violate the Fifth and Fourteenth Amendments to the United States Constitution. There is no defense in federal or state constitutional law which justifies a taking of private property by government because the government acted in good faith. If we were to apply the principles enunciated by the Fourth District in its opinion to any number of situations, government

could totally circumvent the Fifth Amendment. For example, the Fourth District concludes that Section 28.33, Fla.Stat., has "been effectively eliminated and, thus, the constitutional interest is implicated only once and under circumstances that will not reoccur". However, there is nothing to prohibit the Legislature from reinacting the statute or making minor modifications to this statute which again takes people's property in violation of the Fifth Amendment. The only effective deterrent and protection against the unbridled discretion of government taking private property is to require government to return the property or give just compensation when the Fifth Amendment has been violated. There is no such thing as a "good faith defense" to a taking under the Fifth Amendment. A taking is a taking.

For the above stated reasons, Petitioners' pray this Court grant jurisdiction in this cause and review the Fourth District's opinion.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, to ALEXANDER COCALIS, Deputy General Counsel for Broward County, Room 248, Broward County Courthouse, 201 S.E. Sixth Street, Fort Lauderdale, Florida 33301 and DAVID WOLPIN, Assistant County Attorney for Palm Beach County, Post Office Box 1989, West Palm Beach, Florida 33402, this 21st day of December, 1982.

POWELL, TENNYSON & ST. JOHN, P.A.

By: /s/ Rod Tennyson
ROD TENNYSON
Attorneys for Petitioners/ Appellants
325-C Clematis Street
West Palm Beach, Florida 33401
Telephone: (305) 659-5133

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY,
FLORIDA.

CASE NO. 81-1484-Bridge

INTERNATIONAL STUDIO
APARTMENT ASSOCIATION,
INC., etc., et.al.,

Plaintiffs,

vs.

ORDER

ROBERT E. LOCKWOOD, etc.,
et al.,

Defendants.

THIS CAUSE is before the court on Defendant's Motion to Dismiss and Abate.

This is a class action to recover from the Clerk of the Court and the County, interest on funds deposited in the Court Registry pursuant to 28.33 Fla. Stat. (1973) from "1973 to date".

The Plaintiff class relies on the decision of the United States Supreme Court in Webb's Fabulous Pharmacies, Inc. v Beckwith, 449 U.S. 155 (1980), which found 28.33 Fla. Stat. (1973) unconstitutional.

The question presented is whether a decision of the United States Supreme Court which finds a Florida Statute unconstitutional is to be given retroactive effect absent any directive from the Court or from the Florida Supreme Court on remand.

The United States Supreme Court has, "recognized the doctrine of nonretroactivity outside

the criminal area many times, in both constitutional and nonconstitutional cases." Chevron Oil Company v. Gains Ted Huson, 404 U.S. 106 (1971). The Court looked to the reliance of the parties, the purpose of the Statute and the possibility of hardship or injustice.

In reiterating this doctrine, the Court has stated:

> Claims that a particular holding of the Court should be applied retroactively have been pressed on us frequently in recent years .... (T)he common request was that we should reach to patterns of conduct premised either on unlawful statutes or on a different understanding of the controlling judge-made law from the rule that ultimately prevailed.
>
> ...
>
> The process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old is 'among the most difficult of those which have engaged the attention of courts, state and federal ....' (Citation omitted). Consequently, our holdings in recent years have emphasized that the effect of a given constitutional ruling on prior conduct 'is subject to no set 'principle of absolute retroactive invalidity' but depends upon a consideration of 'particular relations ..., and particular conduct ... of rights claimed to have become vested, of status, of prior determinations deemed to have finality'; and 'of public policy in the light of the nature both of the statute an of its previous application.' (Citation omitted).
> ... (S)tatutory or even judge-made rules of law are hard facts on which people must rely in working decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity.

Lemon v. Kurtzman, 411 U.S. 197, 198, 199 (1973). Thus it is clear that retroactive application of a

decision is not required, but is within the court's discretion. The Clerk's acting on a statutory directive to invest deposited funds in interest-bearing certificates and to retain such interests, meets the reliance test stated by the United States Supreme Court.

In Addition, an Act of the Florida legislature is presumptively valid until declared otherwise by an appellate court, In re the Estate of Caldwell, 247 So. 2d 1 (Fla. 1971), therefore, the Clerk's reliance was not misplaced.

Both Plaintiff and Defendant look to Florida case law citing Florida Forest and Park Services v. Strickland, 18 So. 2d 151 (Fla. 1944), for the general rule of retroactive application of a decision of last resort and the exception to that rule.

> Ordinarily, a decision of a court of last resort overruling a former decision is retrospective as well as prospective in its operation, unless specifically declared by the opinion to have a prospective effect only. (Citations).
>
> Generally speaking, therefore, a judicial construction of a statute will ordinarily be deemed to relate back to the enactment of the statute, much as though the overruling decision had been originally embodied therein. To this rule, however, there is a certain well-recognized exception that where a statute has received a given construction by a court of Supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation.

Id. at 253. Thus Florida does not mechanically apply

a general rule of retroactivity but provides for exceptions to the rule.

Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss and Abate refers to principles of retroactivity in the criminal context. It is this Court's opinion that cases involving the payment of taxes provide the better analogy.

In Gulesian v. Dade County School Board, 281 So. 2d 325 (Fla. 1973), the Florida Supreme Court upheld the trial court's decision not to require refunds of $7,300,000 in taxes collected pursuant to a statute later declared unconstitutional. In refusing to give retroactive effect to the decision, the Court reconsidered the School Board's good faith reliance on the statute, the hardship such a refund would impose on taxpayers and the voluntary nature of the payment. Thus, the reliance test was applied although not in itself dispositive. Plaintiffs do not allege that the Clerk acted other than in good faith.

In addition, Florida has made clear its policy that refunds of taxes voluntarily paid will not be made without an authorizing statute. "(U)nless there is some statute which authorizes a refund, money cannot be refunded or recovered once it has been paid although levied under the authority of an unconstitutional statute." State ex rel Victor Chemical Works v Gay, 74 So. 2d 560 (Fla. 1954).

This court is not unmindful of the plight of the Plaintiff Class, however, absent a clear directive from a court of last resort or a statute authorizing refunds of the interest involved, this Court, for the reasons stated, will not give retroactive effect to Webb's Fabulous Pharmacies, Inc., supra in order to provide such refunds. Accordingly it is

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss is granted and the case dismissed with prejudice for failure to state a cause of action. It is

FURTHER ORDERED that this decision makes it unnecessary to consider the alternative Motion to Abate.

ORDERED AND ADJUDGED in Chambers in Fort Lauderdale, Broward County, Florida, this 15th day of October, 1981.

/s/ Barbara Bridge
CIRCUIT COURT JUDGE

Copies furnished:

Rod Tennyson, Esq.
Alexander Cocalis, Esq.

IN THE CIRCUIT COURT OF
THE SEVENTEENTH JUDICIAL
CIRCUIT OF FLORIDA, IN AND
FOR BROWARD COUNTY.
CIVIL DIVISION

CLASS REPRESENTATION

CASE NO. 81-01484 "J" Bridge

INTERNATIONAL STUDIO
APARTMENT ASSOCIATION,
INC. and ROYAL COAST
CONDOMINIUM ASSOCIATION,
INC., Florida Corpor-
ations not for profit,

Plaintiffs,

vs

ROBERT E. LOCKWOOD, Clerk of
the Circuit Court, 17th
Judicial Circuit of Florida,
and BROWARD COUNTY,

Defendants.

---

AMENDED COMPLAINT

COMES NOW the Plaintiffs, INTERNATIONAL STUDIO APARTMENT ASSOCIATION, INC. and ROYAL COAST CONDOMINIUM ASSOCIATION, INC., Florida Corporations not for profit, by and through their undersigned counsel, and hereby sues the Defendants, ROBERT E. LOCKWOOD, Clerk of the Circuit Court, 17th Judicial Circuit of Florida, and BROWARD COUNTY, and allege the following:

CLASS REPRESENTATION ALLEGATIONS

1. That the Plaintiffs are Florida Corporations not for profit who bring this action as a class action under Rule 1.220, Fla.R.Civ.P., amended January 1, 1981, and allege as follows:

(a) Count I of this class action is brought under Rule 1.220(b)(2) in that the Defendants have refused to act on grounds generally applicable to all members of the class, as further alleged herein, thereby making final injunctive and declaratory relief concerning the class as a whole appropriate.

(b) The questions of law or fact are common to the claim of the Plaintiffs and the claim of each member of the class as further alledged herein.

(c) Plaintiffs deposited recreation rentals with the Clerk of the Circuit Court, 17th Judicial Circuit in an amount in excess of $29,925 in the case of International Studio Apartment Association, Inc. v. Sun Holiday Resorts, Inc., Case No. 78-7048, Circuit Court Broward County, and in an amount in excess of $175,000 in the case of Royal Coast Condominium Association, Inc. v. J & W Investment, Inc., Case No. 76-5367, Circuit Court Broward County. Said rentals were deposited under the same procedures as any funds are deposited with the Clerk of the Circuit Court, in that the Clerk of the Circuit Court used said funds and funds similarly deposited by Class Members, or on behalf

of Class Members, or funds which were ultimately disbursed to Class Members, to invest in savings accounts, time certificates and other investments which earned interest, pursuant to Sections 28.33, 74.051 and 74.061, Fla.Stat. (1973).

(d) The total number of class members who also deposited cash, or cash was deposited on their behalf, with the Clerk of the Circuit Court is not known to the Plaintiffs but is believed to be so numerous as to make it impractical to bring them all before the Court. All Class Members are persons who, like the Plaintiffs, deposited cash, or cash was deposited on their behalf, with the Clerk of the Circuit Court, 17th Judicial Circuit, and whose funds were also invested by the Clerk of the Circuit Court, 17th Judicial Circuit, pursuant to Sections 28.33, 74.051 and 74.061, Fla.Stat. (1973). A complete listing of each Class Member is available from the Clerk of the Circuit Court's records. The Plaintiffs are the proper representatives of the Class Members in that they are residents of Broward County who have extensively litigated class action issues in the 17th Judicial Circuit and who have themselves a monetary claim in this cause exceeding $10,000.00 in lost interest. Plaintiffs will vigorously protect the rights and claims of all Class Members.

(e) The Clerk of the Circuit Court collected interest earned from deposited monies owned by the Plaintiffs and Class Members and used said

interest earned to partially fund the operations of the Clerk's Office. A substantial portion of the interest earned was also turned over to Broward County for County operations. Both the Clerk of the Circuit Court and Broward County have publically and officially stated that interest monies earned from the Court Registry deposits would not be refunded to the Plaintiffs or Class Members even though the Supreme Court of the United States has declared this practice of retaining interest monies earned to be violative of the Fifth and Fourteenth Amendments to the United States Constitution. Webb's Fabulous Pharmacies, Inc. et al. v. Beckwith, 49 LW 4033, No. 79-1033, December 9, 1980.

COUNT I

2. That this is an action for declaratory and other supplemental relief brought by the Plaintiffs and Class Members.

3. That the Plaintiffs and Class Members from 1973 to date have deposited funds, or funds were deposited on their behalf, with the Clerk of the Circuit Court, 17th Judicial Circuit. The Clerk of the Circuit Court has invested said funds and earned in excess of $1,000,000.00 in interest which he used for his own office operation and/or which he turned over to Broward County.

4. That the Clerk's and County's policy of retaining interest in this manner violates the State of Florida Constitution and the Fifth and Fourteenth Amendments to the United States Constitution in that it deprives the Plaintiffs and Class Members of their property (interest earned on monies deposited) without due process of law.

5. That the Defendants have publically and officially stated that they will not refund the interest monies earned to the Plaintiffs or Class Members.

6. In order to gain refunds of interest monies earned, the Plaintiffs have had to retain the undersigned law firm and have agreed to pay them reasonable attorneys fees.

7. Plaintiffs and Class Members are uncertain as to their rights for a refund of interest monies and seek a declaration thereof.

WHEREFORE, Plaintiffs and Class Members pray that this Court declare their rights and create a special fund of all interest monies earned in the 17th Judicial Circuit to date, and to order the return of said monies to the Plaintiffs and Class Members less reasonable attoneys fees.

COUNT II

8. That paragraphs 1 through 6 herein are realleged.

9. That Count II of this class action is also brought under Rule 1.220(b)(3) in that the Plaintiffs and Class Members seek a claim for damages in excess of $2,500.00 per named Plaintiff and in excess of $1,000,000.00 for all Class Members against the Defendants, and further state:

(a) The right of Plaintiffs and Class Members to the interest earned concerns questions of constitutional law and fact common to all the parties and the claims of class members differ only as to the amount of damages to each class member;

(b) A class action is superior to individual lawsuits which would involve numerous actions on small accounts making such actions economically inefficient and impractical;

(c) If individuals (class members) were required to bring individual actions, the expense of the court proceedings and defense of the Defendants would be much greater than a class action;

(d) A class action consisting of the alleged Class Members is a manageable class action with membership consisting of primarily Broward County residents. All Defendants reside and perform their official duties in Broward County. The monies and records of all Court deposits are all located in Broward County.

(e) Any difficulties in managing this class action can be resolved, after the determination of liability, by creating a special fund with a special

master to award claims from such a special fund.

10. That the refusal of the Defendants to return interest earned on funds deposited by or on behalf of the Plaintiffs and Class Members without due process of law has damaged the Plaintiffs and Class Members in excess of $1,000,000.00.

WHEREFORE, Plaintiffs and Class Members pray that this Court enter judgment in excess of $1,000,000.00 against the Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, to ALEXANDER COCALIS, Deputy General Counsel, Broward County, Room 248, County Courthouse, 201 Southeast 6th Street, Fort Lauderdale, Florida 33301, this 8th day of April, 1981.

POWELL, TENNYSON & ST. JOHN, P.A.

By /s/ Rod Tennyson
ROD TENNYSON
Attorneys for Plaintiffs
319 Clematis Street
Comeau Building Arcade
West Palm Beach, Florida 33401
Telephone: (305) 659-5133

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1982

INTERNATIONAL STUDIO APARTMENT ASSOCIATION, INC. and ROYAL COAST CONDOMINIUM ASSOCIATION, INC., Florida corporations not for profit,

Appellants,

v. CASE NO. 81-1998

ROBERT E. LOCKWOOD, etc., et al.,

Appellees.

Opinion filed November 24, 1982

Appeal from the Circuit Court for Broward County; Barbara Bridge, Judge.

Rod Tennyson and David St. John of Powell, Tennyson & St. John, P.A., West Palm Beach, for appellants

Harry A. Stewart, General Counsel, and Alexander Cocalis, Deputy General Counsel, for Broward County, Fort Lauderdale, for appellees

Charles F. Schoech, County Attorney, and David M. Wolpin, Assistant County Attorney, West Palm Beach, for Palm Beach County as amicus curiae.

HERSEY, J.

Appellant non-profit corporations filed a class action suit against Broward County and the Clerk of the Circuit Court of the Seventeenth judicial Circuit. The gravamen of their complaint was that litigants who had deposited money in the registry of the circuit court were entitled, upon prevailing in the litigation which occasioned that deposit, to

be paid the interest which had accrued on the deposit while the litigation was pending. This appeal was brought from an order dismissing with prejudice an amended complaint requesting that relief.

The initial deposits in the registry of the court by members of the class were apparently made in accordance with Section 718.401(4), Florida Statutes (1977), since the related litigation arose out of disputes involving condominium recreation area leases. The statute permitted members of the class to pay rent due under such leases into the registry of the court pending resolution of the dispute and prevented the lessor from taking action to dispossess or otherwise penalize defaulting tenant/class members provided rent payments were timely paid into the registry.

Another statute, Section 28.33, Florida Statutes (1977), authorized the clerk of the circuit court to invest funds deposited into the registry of the courts and provided that interest earned in this fashion would be deemed income of the office of the Clerk of the circuit court. This latter statute was tested and declared constitutional by the Florida Supreme Court in Beckwith v. Webb's Fabulous Pharmacies, Inc., 374 So.2d 951 (Fla. 1979). Thereafter, however, in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 445 U.S. 925, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980), that aspect of the statute which

permitted the clerk to retain the income earned on deposited funds was declared unconstitutional. On remand the Florida Supreme Court further declared unconstitutional the portion of the statute authorizing the clerk to invest deposited funds. B~Beckwith, 394 So.2d 1009 (Fla. 1981).

The present suit was brought to test whether the holding of unconstitutionality in Webb's, 445 U.S. at 925, would be applied retrospectively, to permit appellants to recover interest accrued during the pendency of the recreation area lease litigation, or prospectively only. The trial court determined that the holding should have only prospective effect. We agree.

The general rule is that judicial decisions in the area of civil litigation have retrospective as well as prospective application, subject to a well established exception which our supreme court carefully analyzed in Florida Forrest and Park Service v. Strickland, 18 So.2d 251 (Fla. 1944).

> [W]here a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation. See 14 Am.Jur.p.345, Sect. 130; 21 C.J.S., Courts, p. 329, 194, Subsec. b. Based upon a recognition of this commonsense exception to the rule, some of the courts have gone so far as to adopt the view that the rights, positions, and courses of action of parties who have acted in conformity with, and in reliance upon, the construction given by a court of final decision to a statute should

> not be impaired or abridged by reason of a change in judicial construction of the same statute made by a subsequent decision of the same court overruling its former decision. Accordingly, such courts have given to such overruling decisions a prospective operation only, in the same manner as though the new construction had been added to the statute by legislative amendment.

Id. at 253.

From 1973 until 1980 parties litigant deposited funds in the registry of Florida courts and the clerks invested those funds and disposed of investment income in reliance on the statute which, in 1979, was stamped with the imprimatur of the Supreme Court of Florida. Had the 1980 decision declaring the statute unconstitutional emanated from the Florida Supreme Court rather than the Supreme Court of the United States, it would have qualified as an "overruling decision" and the exception permitting prospective operation only would have applied. Certainly the public policy considerations which created the impetus for the establishement of the "prospective operation only" exception in the first instance apply with no less compelling force where "court of supreme jurisdiction" takes its authority from the federal rather than a state constitution. In view of the fact that neither the Supreme Court of the United States nor the Florida Supreme Court specifically addressed the issue, we conclude that in the absence of a superior and compelling federal principle, the "prospective operation only" exception

should be applied in situations such as those represented by the present case.

Further, there is at least a hint in the Florida Supreme Court's earlier decision upholding the constitutionality of the statute that at least that court (Florida Supreme Court) would apply such a ruling only prospectively. The trial court in Webb's invalidated the statute. Upon direct appeal the Florida Supreme Court reversed the trial court and upheld the statute. Interestingly, in doing so, the court specifically ruled that its decision would "apply in this case and in all cases where deposits of funds are made after the effective date of this opinion." In other words the ruling was given prospective effect only. Although no reasons were given for doing so, it seems apparent that the court was concerned that others may have relied on the trial court ruling invalidating the statute. Surely, if persons who have relied on the invalidity of a state statute are to be protected, it would make no sense to afford less protection to those who have acted in good faith reliance on the validity of the statute.

Turning then to an examination of the federal precedent, Chevron Oil Company v. Huson, 404 U.S. 106, 92 S.Ct. 349 (1971), promulgated a three phase test which is applied to determine whether a decision should have retroactive effect. Formulating that test the court stated:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see e.g., Hanover Shoe, Inc. v. United Show Machinery Corp., supra, 392 U.S., at 496, 88 S.Ct., at 2233, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., Allen v. State Board of Elections, supra, 393 U.S., at 572, 89 S.Ct., at 835. Second, it has been stressed that "we must *** weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Linkletter v. Walker, supra, 381 U.S., at 629, 85 S.Ct., at 1738. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." Cipriano v. City of Houma, supra, 395 U.S., at 706, 89 S.Ct. at 1900.

Id. at 106-07. It is important to note that all three tests must be met. Valencia v. Anderson Brothers Ford, 617 F.2d 1278 (7th cir. 1980); N.L.R.B. v. Lyon & Ryan Ford, Inc., 647 F.2d 745 (7th Cir. 1981). In refining the first factor, the supreme court noted the difficulty of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded in the old. Lemon v. Kurtzman, 411 U.S. 192, 93 S.Ct. 1463 (1973). According to the court,

> We have approved nonretroactive relief in civil litigation, relating, for example, to the validity of municipal financing founded upon electoral procedures later declared unconstitutional, Cipriano v. City of Houma, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969), and City of Phoenix, Arizona v. Kolodziejski, 399 U.S. 204, 90 S.Ct. 1990,

> 26 L.Ed. 2d 523 (1970); or to the validity of elections for local officials held under possibly discriminatory voting laws, Allen v. States Board of Elections, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed. 2d 1 (1969). In each of these cases, the common request was that we should reach back to disturb or to attach legal consequence to patterns of conduct premised either on unlawful statutes or on a different understanding of the controlling [sic: effect?] of judge-made law from the rule that ultimately prevailed.

Id. at 197-198.

The court then stated, "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing the doctrine of nonretroactivity." Id. at 199.

In the instant case, the litigants, particularly appellees, relied upon section 28.33 without question. Thus, the unconstitutionality of the statute was an issue of first impression (in Webb's Fabulous Pharmacies) whose resolution was not clearly foreshadowed. More specifically, the clerk of the circuit court in this case, pursuant to section 28.33, invested the funds deposited by litigants into the court registry and, in reliance on section 28.33, retained the interest earned, using it for the operation of his office and turning over any balance to the Board of County Commissioners.

In our view retrospective operation of Webb's Fabulous Pharmacies will neither further nor retard the rule (constitutional protection against

deprivation of property without due process), so that the second factor in the Chevron test is similarly satisfied. As stated in Lemon, 411 U.S. at 201-02, which dealt with the question of retroactive application of a decision holding a statutory program to reimburse nonpublic sectarian schools for certain secular educational services unconstitutional:

> The sensitive values of the Religion Clauses do not readily lend themselves to quantification but, despite the inescapable imprecision, we think it clear that the proposed distribution of state funds to Pennsylvania's nonpublic sectarian schools will not substantially undermine the constitutional interests at stake in Lemon I . . .
>
> . . . Second, there is the question of impinging on the Religion Clauses from the fact of any payment that provides any state assistance or aid to sectarian schools — the issue we did not reach in Lemon I. Yet even assuming a cognizable constitutional interest in barring any state payments, under the District Court holding that interest is implicated only once under special circumstances that will not recur.

Here, as in Lemon, even if for the sake of argument a taking is assumed, the constitutional interest is implicated only once and under circumstances that will not recur, the statute having been effectively eliminated. In determining whether nonretroactive application of Webb's will undermine the constitutional interest at stake, it is important to consider the exact nature of that constitutional interest in relation to the present case. First, appellants apparently never questioned the constitutionality of section 28.33 either at the

time the funds were deposited in the court registry, during the pendency of the claim, or when they were ultimately determined to be the owners of the principal deposited. Thus, appellants did not evidence a belief that any constitutional rights were being violated as did the parties in Webb's. Further, had the clerk not invested the funds pursuant to the statute, there would have been no interest earned and therefore no "property" subject to a "taking." Accordingly, appellants are in the same position they would have been in had the statute not been in existence -- without interest on the deposited funds -- thus retrospective operation of Webb's has no measurable effect on the constitutional interest in question.

Lastly, if applied retroactively, Webb's could produce injustice and hardship on the clerk and county by mandating the return of monies long since expended. In this regard this case is strikingly similar to the circumstances present in Gulesian v. Dade County School Board, 201 so.2d 325 (Fla. 1973), wherein the court refused to order a refund of taxes collected in good faith by the school board under a presumptively valid state statute which was subsequently judicially invalidated. Appellants, on the other hand, are now in the same position as if the statute had never been in operation. Thus, even though retention of the interest earned was characterized as a taking in Webb's, appellants

suffer no hardship or injustice since they have the principal, the amount to which they were entitled both before and after operation of the statute.

Concluding, we point out that neither the Florida Supreme Court nor the Supreme Court of the United Staes spoke to the issue of whether the unconstitutionality of section 28.33 was to be given retroactive effect. Application of the analagous Florida rule and the specific federal rule each produces the identical result. Based upon the principles derived from both federal and Florida precedent we affirm the order dismissing appellants' amended complaint with prejudice.

AFFIRMED.

DOWNEY and ANSTEAD, JJ., concur.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA FOR
THE FOURTH DISTRICT

INTERNATIONAL STUDIO APARTMENT ASSOCIATION, INC., and ROYAL COAST CONDOMINIUM ASSOCIATION, INC., Florida corporations not for profit,

Appellants,

vs.

ROBERT E. LOCKWOOD, etc., et al.,

Appellees.

---

Appeal from the Circuit Court for Broward County

APPELLANTS' MAIN BRIEF

POWELL, TENNYSON & ST. JOHN, P.A.
325-C Clematis Street
West Palm Beach, Florida 33401
Telephone: (305) 659-5133

Attorneys for Appellants

## TABLE OF CITATIONS

| OTHER | PAGE |
|---|---|
| 31 Fla.Jur. Taxation, 68 | 18 |
| 31 Fla.Jur. Taxation, 20 | 26 |

## PREFACE

The Appellants are the Plaintiffs below and the Appellees are the Defendants. The parties will be referred to as the "Plaintiffs" and the "Defendants".

The following symbols will be used:

R - Record

A - Appendix

This case involves the direct application of a recent Supreme Court decision in Webb's Fabulous Pharmacies, Inc., v. Beckwith, 445 U.S. 925, 66 L.Ed.2d 358, 101 S.Ct. 446 (1980). Because this case is cited so frequently it is included in the Appendix and is referred to in this brief as "Webb's".

## POINTS ON APPEAL

I. "PROSPECTIVE ONLY" EFFECT SHOULD NOT BE GIVEN TO A UNITED STATES SUPREME COURT DECISION WHICH DECLARES A STATE STATUTE AN UNCONSTITUTIONAL "TAKING" WITHOUT JUST COMPENSATION WHERE THE STATE STATUTE ALLOWED A COUNTY TO RETAIN INTEREST EARNED ON FUNDS DEPOSITED BY PRIVATE CITIZENS IN THE REGISTRY OF THE COURT.

A. A Decision of a Court is Presumed to be Retroactive Unless Specifically Declared by the Opinion to have a Prospective Effect Only.

B. The Instant Case Does Not Meet the United States Supreme Court's Criteria For "Prospective Only" Application of Judicial Decisions.

II. THE FAILURE OF THE PLAINTIFFS TO PROTEST THE COUNTY'S RETENTION OF THEIR INTEREST DOES NOT PREVENT THEM FROM RECOVERING THAT INTEREST AFTER THE COUNTY'S ACTION WAS DECLARED UNCONSTITUTIONAL.

III. WHERE LOCAL GOVERNMENT UNCONSTITUTIONALLY TAKES PROPERTY OF ITS CITIZENS, THAT GOVERNMENT CANNOT RETAIN THE PROPERTY TAKEN BECAUSE THERE IS NO STATUTE AUTHORIZING THE PROPERTY'S RETURN TO ITS RIGHTFUL OWNERS.

## STATEMENT OF THE CASE AND OF THE FACTS

Plaintiffs sued the Defendants in the Circuit Court for Broward County. The Court entered an Order on October 15, 1981 dismissing the case with prejudice. (R-16). Plaintiffs filed their Notice of Appeal on October 29, 1981. (R-20).

The action below was brought to recover interest earned on funds deposited in the Broward County Court Registry. It is a class action brought by two condominium associations on behalf of themselves and other persons who deposited funds in the Court Registry. Defendants are the Clerk of the Circuit Court and Broward County. (R-1).

Defendants filed a Motion to Dismiss for failure to state a cause of action. (R-13). The Court entered an Order on October 15, 1981 granting the Motion to Dismiss and dismissing the Plaintiffs' Complaint with prejudice. (R-16).

The action below was based upon the recent United States Supreme Court decision in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 445 U.S. 925, 66 L.Ed.2d 358, 101 S.Ct. 446 (1980). In this case the Supreme Court held unconstitutional Florida Statute providing that

> All interest accruing from monies deposited shall be deemed income of the Clerk of the Circuit Court investing such monies and shall be deposited in the same accounts as are other fees and commissions of the clerk's office.

Section 28.33, Fla.Stat. (1977). This act took effect on July 1, 1973.

The Webb's case arose from the proposed purchase of Webb's Fabulous Pharmacies by Eckerd Drug Stores, wherein the more than $1,800,000 purchase price was deposited in the registry of the court. The parties objected to the county retaining the interest earned on the funds deposited. The funds deposited earned more than $100,000 in interest. The parties did not object to the statutory service fee of more than $9,000 for county services rendered in handling the deposit. Webb's supra. (A-4). The Plaintiffs in the Broward County action below did not protest the collection of the interest.

In dismissing the Plaintiffs' Complaint with prejudice, the Court below stated

> (A)bsent a clear directive from a court of last resort or a statute authorizing refunds of the interest involved, this Court, for the reasons stated, will not give retroactive effect to Webb's Fabulous Pharmacies, Inc., supra, in order to provide such refunds.

(A-16, 17).

## ARGUMENT

I. "PROSPECTIVE ONLY" EFFECT SHOULD NOT BE GIVEN TO A UNITED STATES SUPREME COURT DECISION WHICH DECLARES A STATE STATUTE AN UNCONSTITUTIONAL "TAKING" WITHOUT JUST COMPENSATION WHERE THE STATE STATUTE ALLOWED A COUNTY TO RETAIN INTEREST EARNED ON FUNDS DEPOSITED BY PRIVATE CITIZENS IN THE REGISTRY OF THE COURT.

A. A Decision of a Court is Presumed to be Retroactive Unless Specifically Declared by the Opinion to have a Prospective Effect Only.

In the case below the Plaintiffs sought to recover from Broward County the interest earned on funds that they had deposited in the Registry of the Court. The Plaintiffs relied upon the United States Supreme Court's recent decision in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 445 U.S. 925, 66 L.Ed.2d 358, 101 S.Ct. 446 (1980). (A-1). In this case, the Supreme Court held that if a County or Clerk of the Circuit Court invested funds held in the Court Registry Account and retained the interest earned on those investments instead of returning them to the owners of the fund then such activity constituted a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

The general rule of long standing is that judicial decisions normally have retroactive as well as prospective effect. IBJ. Moore, Federal Practice, para. 0.402 [.3-2-1] (1974); Fla. & Forest Park Service v. Strickland, 18 So.2d 251 (Fla. 1944).

Furthermore, under federal law "there is a presumption favoring retroactivity". N.L.R.B. v.

Lyon and Ryan Ford, Inc., 647 F.2d 745 (7th Cir. 1981). Similarly, the Florida Supreme Court has stated

> Ordinarily, a decision of a court of last resort overruling a former decision is retrospective as well as prospective in its operation, unless specifically declared by the opinion to have a prospective effect only. (emphasis supplied)

Fla. Forest & Park Service, supra, at 253.

While there are exceptions to this general rule, neither the United States Supreme Court's decision in Webb's, nor the Florida Supreme Court's opinion on remand, made any specific reference to the decision having a prospective effect only. Webb's, supra; Beckwith v. Webb's Fabulous Pharmacies, Inc., 394 So.2d 1009 (Fla. 1981). Since this case does not meet the criteria spelled out by the United States Supreme Court for "prospective only" application, it is reasonable to assume that the highest courts in both Florida and the United States knowingly refrained from specifiying this case as an exception to the general rule requiring retroactive application.

B. The Instant Case Does Not Meet the United States Supreme Court's Criteria For "Prospective Only" Application of Judicial Decisions.

While the non-retroactive application of judicial decisions has been most conspicuously considered in the area of the criminal process, the United States Supreme Court has specifically addressed the question of the application of non-retroactivity to civil cases.

The Court has devised a three part test to identify situations in which a civil precedent should apply on a prospective basis only. This test is

> (1) Does the decision "establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed?"
>
> (2) Considering "the prior history of the rule in question, its purpose and effect," does retroactive application "further or retard" the operation of the rule?
>
> (3) Does retroactive application create "injustice or hardship" for one of the parties?

Chevron Oil Company v. Huson, 404 U.S. 106-107, 92 S.Ct. at 355 (1971).

It has been specifically held that all three parts of the test must be found in order to support a prospective application and limit the retroactive effect of a decision. N.L.R.B. v. Lyon and Ryan Ford, Inc., supra; Valencia v. Anderson Brothers Ford, 617 F.2d 1278 (7th Cir. 1980). The circumstances in this case apply to the three part test as follows:

(1) Does the Decision Establish a New Principle of Law, Either by Overruling Clear Past Precedent on which the Litigants may have Relied or by Deciding an Issue of First Impression whose Resolution was not Clearly Foreshadowed?

The instant case probably meets the first part of the test in that it involves "an issue of first impression whose resolution was not clearly foreshadowed".

(2) Considering the Prior History of the Rule in Question, its Purpose and Effect, does Retroactive Application Further or Retard the Operation of the Rule?

The principle involved in this decision is the application of the United States and Florida Constitutions' mandate against taking private property for public use without just compensation. In view of the historically strong Federal and State judicial stand against government confiscation of private property without just compensation, it would clearly "retard" the operation of the principle if this decision were not applied retroactively.

In Webb's the United States Supreme Court held that the interest from the funds deposited in the Registry of the Florida Courts is "private property". The Court noted that

> The earnings from a fund are incidents of ownership of the fund itself and are property just as the fund itself is property.

Webb's, supra, 101 S.Ct. at 452; (A-7).

The Court spoke forcefully of the principal it was enunciating when it stated

> . . . (the county) may not transform private property into public property without compensation, even for the limited duration of the deposit in the court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

Id. 101 S.Ct. at 452; (A-7).

The Taking Clause of the Fifth Amendment would

be no "shield" at all "against arbitrary use of governmental power" if county government is not required to return the interest wrongfully taken in this case.

Florida law has long upheld the basic fundamental rights of citizens to personal property. In holding that a municipality took property without just compensation, the Florida Supreme Court stated

> Depriving one of his property is not a trivial matter. The ownership of property is one of the most sacred rights encouraged and protected by both our state and federal Constitutions. There is no greater safeguard to the perpetuity of our republican traditions and institutions than the responsibility of property ownership, and no municipality has the right to deprive one of such ownership except by due process of law and making just compensation therefor, as defined by the Constitution.
>
> State and municipal governments are instituted and taxes collected for the purpose of protecting the personal and property rights of its citizens, and the officers of a municipality or state have no more responsible duty than to see that these rights are safeguarded.

City of Palmetto v. Katsch, 98 So. 352 (Fla. 1923).

Once the United States and Florida Supreme Courts had issued their Mandates declaring the interest from court deposits to be "private property", it was incumbent upon the County government to protect those personal and property rights of its citizens and return the interest wrongfully collected. As the Supreme Court stated above, the County officers ". . . have no more responsible duty than to see that these rights are safeguarded." Id. at 354.

Obviously, the key to this issue is the Supreme

Court's clear-cut holding that the interest collected is "personal property". Having so held, this case should be viewed in the context of one step in a line of decisions related to the protection of property rights from unconstitutional governmental action. Not to apply the Court's Webb's decision in a retroactive manner would result in allowing a governmental taking of private property without just compensation or due process of law. On this point the Florida Supreme Court has said

> It is indeed a serious matter for government to confiscate property. . . without the payment of just compensation. . . .
>
> . . .
>
> Under no circumstances can private property be taken by the state without due process of law, . . . . (emphasis supplied)

Keating v. State, 173 So.2d 673 (Fla. 1965).

The decision in this case will be a significant step in the direction of Florida law relating to unconstitutional taking of private property. Having determined the interest to be "private property", the precedent of allowing the government to keep property unconstitutionally taken would begin an erosion of the principle, long held by the courts of Florida, that the right to private property is a sacred and basic right which is fundamental to a free society.

The failure to give Webb's retroactive application would "retard" the operation of the principles forcefully set out in the decision itself.

Prospective only application of the decision would make a mockery of the court's pronouncement that the Fifth Amendment "Taking Clause . . . stands as a shield against the arbitrary use of governmental power".

Clearly, this case fails to meet the second element of the test the Supreme Court has devised to determine prospective only application of decisions. Although it is only necessary to fail one part of the three part test to justify a decision's retroactive application, the circumstances of the Webb's decision also fails to meet the following third criteria as well.

(3) Does Retroactive Application Create Injustice or Hardship for One of the Parties?

Most of the leading cases dealing with retroactivity of judicial decisions find "injustice or hardship" because a litigant would have lost a cause of action as a result of the decision. In the leading case of Fla. Forest & Park Service, supra, a litigant would have lost his "potentially valuable claim . . . if he must follow the construction now placed on the Statute by the overruling decision". Consequently, the Court held the decision would be prospective only. Id. at 254. Similarly, Florida's Third District Court of Appeal held that it would not retroactively apply a decision construing a 30 day appeal period where the prior rule had provided for 60 days. The Court specifically allowed those

appeals which were timely filed during the 60 day period. Fuller v. Riley, 124 So.2d 499 (3rd DCA 1960). In the Chevron case noted above, the United States Supreme Court ruled that an action for personal injuries on an offshore oil drilling rig was governed by a state's 1-Year Statute of Limitations rather than the Federal 4-Year Statute. Consequently, the decision was specifically held prospective only in order not to unjustly prevent a litigant's right to action under the Federal 4-Year Statute of Limitations. The Court said to rule otherwise would produce "substantial inequitable results". Chevron Oil Company v. Huson, supra, 404 U.S. at 108, 92 S.Ct. at 356.

In the present case it is the citizens who deposited their funds in the Court Registry who will lose a cause of action if Webb's is not held retroactive. The Florida Supreme Court has enunciated a clear cause of action against a local government for a well intentioned but wrongful taking of funds from individuals. Where a city borrowed money without authority and denied liability to repay the funds, the Florida Supreme Court held that

> When money is borrowed by a municipal corporation without authority of law, but it is used and applied for legitimate purpose, the [municipal] corporation is liable on the principles of equity and justice, as on an implied assumption, for money had and received.

Johnson v. Town of Anthony, 156 So. 732 at 734 (Fla.

1934). Similarly, where a Florida county claimed that it was without authority to pay a contractor for work furnished, the Florida Supreme Court (quoting from an earlier Florida case) stated

> The doctrine of [implied municipal] liability . . . applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtained the money of another by mistake, or without authority of law, it is her duty to refund it - not from any contract entered into by her on the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial. If the city obtained other property which does not belong to her, it is her duty to restore it; or if used by her, to render an equivalent to the true owner, from the like general obligation.

Webb v. Hillsborough County, 175 So. 874 at 878 (Fla. 1935).

Clearly, it would be unjust to prohibit the Plaintiffs from pursuing remedies which the Florida Supreme Court has specifically enunciated for this situation.

Both sides in this case claim that "injustice or hardship" will result if their position is not supported by this Court. The County complains that to apply Webb's retroactively would

> . . . impose a burden on all taxpayers to repay a few for monies collected and spent in good faith reliance on an act of the Legislature upheld by the highest court of this State.

(A-10).

It should be noted that the interest collected went to defray expenses that are the responsibility of all the taxpayers in the County. Furthermore, a separate service fee was charged for handling the deposited funds. Webb's, supra, 101 S.Ct. at 448; (A-3).

A paraphrase of the County's position quoted above from the Plaintiffs' point of view is to state that to fail to apply Webb's retroactively would impose a burden on a few citizens for governmental expenses that are the responsibility of all the taxpayers where the citizens relied in good faith that the Legislature would not pass an act which violated their fundamental constitutional rights.

Another element of "injustice" to either party involves the issue of reliance on the State Statute before it was held unconstitutional. The Order of the Court below emphasized the reasonableness of the County's reliance on the State Statute. (A-15). Concerning governmental employee reliance on state statutes, the U.S. Fifth Circuit Court of Appeal has ruled directly on point in the case of McDonald v. Department of Public Welfare of State of Fla., 430 F.2d 1268 (1970). In McDonald a Florida law requiring a residency requirement for an "Aid to the Blind" welfare program was held unconstitutional. The Florida Department of Public Welfare argued that the decision should be given prospective effect only

so that back payments would not have to be made to those who were previously ineligible because of the Florida Statute. In giving the decision retroactive effect the Fifth Circuit stated that

> [A]ppellant is apparently arguing that Shapiro should be given prospective effect only. In support of this position, it states that the Florida Department of Public Welfare has relied on the state's durational residence requirement. We find this argument singularly unpersuasive. Presumably, all statutes invalidated as unconstitutional were relied on by state employees until invalidated.

Id. at 1269.

Obviously, all state and local government employees rely upon State Statutes governing their activities until such time as a statute may be declared unconstitutional. To allow the reliance argument to prevail in a case involving an unconstitutional Statute related to local government would be tantamount to giving "prospective only" effect to all decisions declaring such a Statute unconstitutional.

In the U.S. Supreme Court case of Simpson v. Union Oil Co. of California, 396 U.S. 13, 90 S.Ct. 30 (1969), the Court held that it was not "unfair" to apply an antitrust decision retroactively because the defendant had a "reasonable basis for believing that its actions were entirely lawful". Id. 90 S.Ct. at 31. Justice Black in his concurring opinion in Simpson stated

> The most elementary conception of justice and public policy requires that the wrongdoer

> shall bear the risk of the uncertainty which his own wrong has created.

Id. 90 S.Ct. at 32.

In terms of measuring relative "injustice" it would seem unfair to allow County government to rely on the constitutionality of a state statute to the financial detriment of a group of citizens who maintained their good faith reliance that government would not unconstitutionally take property from them.

A determination of the injustice or hardship in this case involves the comparative "burden" on the County of returning wrongfully collected funds versus the "burden" on citizens who will be paying considerably more than their fair share to financially support the cost of County government.

On this point the United States Supreme Court addressed a very similar situation in the case of United States v. United States Coin & Currency, 401 U.S. 715, 91 S.Ct. 1041 (1971). In that case the court held that it was unconstitutional to require the forfeiture of property pursuant to a gambling tax statute previously held unconstitutional. The Government argued that the unconstitutional forfeiture statute should not be applied retroactively because over the years the government had seized almost $7,000,000 worth of money and property in reliance on the court's earlier decisions which upheld the validity of the gambling tax requirements. The Government stated that they anticipated considerable

litigation from others who would attempt to reclaim property seized. Although the Government strongly urged that the decision not be given retroactive effect, the court did not accept the "hardship" argument. Additionally, the court went on to distinguish retroactivity considerations in procedural matters from those involving constitutional violations. The court stated

> Unlike some of our earlier retroactivity decisions, we are not here concerned with the implementation of a procedural rule which does not undermine the basic accuracy of the fact finding process at trial. . . for we have held that the conduct being penalized is constitutionally immune from punishment. No circumstances call more for the invocation of a rule of complete retroactivity.

Id. 91 S.Ct. at 1046.

As in Coin and Currency, the present case involves a violation of a fundamental constituting principle rather than the implementation of a new procedural rule.

In terms of "injustice" and "hardship" the Court might also consider the financial situation of some of the citizens from whom the County collected interest. Florida courts collected interest on funds deposited from 1973 until 1981. During this time South Florida courts saw considerable litigation challenging the validity of 99-year condominium recreational leases. Initially these cases involved the deposit of thousands of dollars in recreational lease rental payments. Many of the unit owners in these condominiums, including the named Plaintiffs in this

class action, are retired citizens living on fixed incomes. It is true that to apply Webb's retroactively would result in some administrative inconvenience in order to return monies wrongfully collected from these citizens. However, these monies have been utilized to defray expenses for services that are the responsibility of all of the citizens of the County.

The issue of citizens paying more than their fair share of expenses of local government addresses a key issue in the "prospective only" tax case specifically relied upon by the County and the Court below. In its Order the Court below stated that "it is this Court's opinion that cases involving the payment of taxes provide (a) better analogy (than criminal cases)". (A-16). Specifically, the Court's Order discussed Gulesian v. Dade County School Board, 281 So.2d 325 (Fla. 1973). The Order stated

> In Gulesian the Florida Supreme Court upheld the trial court's decision not to require refunds of $7,300,000 in taxes collected pursuant to a statute later declared unconstitutional. In refusing to give retroactive effect to the decision, the court considered the School Board's good faith reliance on the statute, the hardship such a refund would impose on taxpayers and the voluntary nature of the payment. Thus, the reliance test was applied although not in itself dispositive.

(A-16).

There are several important distinctions between Gulesian and the instant case. First, in Gulesian

the County was faced with the refund of $7,300,000 in small amounts to over 350,000 taxpayers. Gulesian, supra, at 326. The present case involves larger individual refunds to a much smaller group of citizens. Consequently, the administrative "hardship" on the County in this case is less. At the same time, the "hardship" on the individual citizens is greater because the amount they will lose is larger than the refund in Gulesian. Secondly and more importantly, the tax levy was shared equally by all the taxpayers. There was no question about the taxing Statute's compliance with the Florida Constitution's requirement for "equality and uniformity of taxation". 31 Fla.Jur. Taxation, 68 at p. 111. All of the County taxpayers in Gulesian were taxed equally and uniformly. In the present case the interest taken constitutes an additional contribution by taxpayers to the general cost of government.

To analogize the present case to the unconstitutional tax cases would suggest that the interest collected was in the nature of a tax on the citizens who deposited funds in the Court Registry. To the extent that the interest collected constitutes a tax, such a tax clearly violates the constitutional requirement for equality and uniformity of taxation. Since the interest went to fund general County operations, the citizens depositing the funds, in

effect, paid a significant amount over and above their regular taxes. In Webb's the Supreme Court addressed this very issue when it stated that

> . . . The exaction (of interest) is a forced contribution to general governmental revenues, and it is not reasonably related to the cost of using the courts.

Webb's, supra, 101 S.Ct. at 452; (A-7).

To further emphasize this point the Webb's Court quoted an earlier United States Supreme Court decision stating

> The Fifth Amendment's guarantee (that private property shall not be taken for a public use without just compensation) was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. Armstrong v. United States, 364 U.S. 40, 49 (1960).

Webb's, supra, 101 S.Ct. 446, 452.

The Gulesian tax case cited by the Court and Defendants below is not only inapplicable to the instant case, it highlights the unfairness and injustice of the present situation. In Gulesian the taxes were equally and uniformly levied even though the taxing statute was ultimately declared unconstitutional for other reasons. In contrast, the Webb's decision itself clearly sets out that the present situation involves the "forced contribution to general governmental revenues" by a small percentage of the citizens of the County.

The Defendants clearly fail the third criteria

of the three part test the United States Supreme Court has enunciated for determining prospective only application of decisions. The failure to retroactively apply the Webb's decision would create more injustice and hardship for the few citizens who deposited their funds in the Court Registry than any hardship to County employees or the total body of taxpayers in the County. There would be some inconvenience to County employees who have to administer the refund of the monies involved. Similarly, there may be some loss of general County revenues. However, the loss would be considerably greater to the citizens depositing the funds than it would be to individual taxpayers who may have to pay their fair share of the County revenues necessary to return the interest. The injustice and hardship of this situation is magnified when applied to those citizens on limited, fixed incomes who, in many cases, are the least able to afford to pay more than their fair share of the operation of County government.

Having failed to meet two of the three criteria which the United States Supreme Court has stated is required before a decision will be applied retroactively only, it is clear that the Florida and the United States Supreme Courts knowingly refrained from specifying this case as an exception to the general rule requiring retroactive application of judicial decisions.

II. THE FAILURE OF THE PLAINTIFFS TO PROTEST THE COUNTY'S RETENTION OF THEIR INTEREST DOES NOT PREVENT THEM FROM RECOVERING THAT INTEREST AFTER THE COUNTY'S ACTION WAS DECLARED UNCONSTITUTIONAL.

The County argued to the Court below that the action should be dismissed because the Plaintiffs did not protest the retention of the interest collected by the County. To the extent the County is alleging that the Plaintiffs are now estopped to raise the unconstitutionality of the taking of their interest, the Florida Supreme Court has addressed this issue in the context of invalid or unconstitutional tax assessments. In the case of City of Treasure Island v. Strong, 215 So.2d 473 (Fla. 1968), the Supreme Court stated that

> It seems well established that the principles of estoppel and waiver will not operate to bar an attack on irregularities and defects which by their nature render assessment proceedings void, as opposed to voidable.

Id. at 477.

In defining a "void" statute the Florida Supreme Court has said

> We are conscious of the rule to the effect that the doctrine of estoppel has no application when an assessment is wholly void; that is to say, when the assessment is made in such a manner as to render it invalid, or when constitutional or statutory provisions essential to its validity are completely ignored,. . .

Gulf View Apartments v. City of Venice, 145 So. 841, 844 (Fla. 1933).

The present case involves a Statute that is void because "constitutional provisions essential to its validity" were ignored. Consequently, the Plaintiffs cannot be estopped from bringing an action to recover their property taken pursuant to the unconstitutional Statute.

More immediately on point with the instant situation is the United States Fifth Circuit Court of Appeal case of United States v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353 (1972). This case is a prodigy of the Coin & Currency case discussed in some detail above. In Coin & Currency the United States Supreme Court held that the unconstitutional forfeiture decision would be applied retroactively. Subsequently, a Florida citizen brought an action to recover property forfeited more than 6 years after his property was seized. The Government contended that the taking of the appellant's property was unlawful and void at the time of such taking. According to the Government the appellant should have brought suit within the six (6) year period of limitations. Similarly, in the instant case the County suggests that the Plaintiffs should have protested or brought some action prior to the decision declaring the Statute unconstitutional. In Red Chevrolet, the Fifth Circuit rejected this argument and stated

The period of limitations does not always

> begin on the date of the wrong. (Citations) No cause of action generally accrues until the plaintiff has a right to enforce his cause. (Citations) The right to sue is hallow indeed until the right to succeed accompanies. Patently, appellant in the instant case had no reasonable probability of successfully prosecuting his claim against the government prior to the enunciation of the new . . . rule on January 29, 1968. We realize that the mere ignorance of one's rights will not toll the limitations. (Citations) This is not, however, a case in which a plaintiff is ignorant of his rights, but rather a case of a plaintiff without a right . . . The government seized the property involved here in a manner which no one thought to be unconstitutional at the time of forfeiture and for years afterwards. However, it is clear today that the government had no right to do so. Considering, . . . the plaintiff's lack of expectancy of success in the intervening years, we hold that the cause of action accrued as of January 29, 1968, the date of the [new] decision. . . . (Emphasis Supplied).

Id. at 1358.

In the instant case the facts closely follow the Red Chevrolet situation. The Plaintiffs had no reasonable probability of successfully prosecuting their claims against the government prior to the Webb's decision. Futhermore, the Plaintiffs in the Webb's case stood to lose more than $100,000 in interest. This amount at risk made it economically feasible to pursue the long involved litigation which ultimately resulted in a favorable decision. The great majority of depositors with the Court Registry would not stand to gain enough interest to make it economically feasible to pay the fees and expenses necessary to challenge the constitutionality of a State Statute.

It should also be noted that the Third District Court of Appeal of Florida in Burleigh House Condominium v. Buchwald, 368 So.2d 1316 (3rd DCA 1979), has agreed with the Fifth Circuit in the Red Chevrolet case. In addition to extensively quoting Red Chevrolet, the Florida's Third District additionally stated

> (T)he cause of action declared upon in this case did not accrue until the time of the (new) decision . . . and the date of that decision marked the commencement of the running of the Statute of Limitations.
>
> . . .
>
> (T)he Statute (of Limitations) attaches where there has been notice of an invasion of the legal right of the plaintiff or he has been put on notice of his right to a cause of action. . . . (Emphasis by the Court)

Burleigh House Condominium v. Buchwald, supra, at 1318, 1319.

In the present case the Plaintiffs did not have notice of their right to a cause of action until the Webb's decision was decided on December 9, 1980.

III. WHERE LOCAL GOVERNMENT UNCONSTITUTIONALLY TAKES PROPERTY OF ITS CITIZENS, THAT GOVERNMENT CANNOT RETAIN THE PROPERTY BECAUSE THERE IS NO STATUTE AUTHORIZING THE PROPERTY'S RETURN TO ITS RIGHTFUL OWNERS.

The Court below stated that it could not apply the Webb's decision retroactively absent "a statute authorizing refunds of the interest involved". (A-16). In support of this decision the Court quoted the following in its Order

> '(U)nless there is some statute which authorizes a refund, money cannot be refunded or recovered once it has been paid although levied under the authority of an unconstitutional statute.' State ex rel. Victor Chemical Works v. Gay, 74 So.2d 560 (Fla. 1954).

(A-16).

In quoting the above provision from Victor Chemical Works, the Court below deleted the first half of the quoted sentence. The entire quote with the deleted part underlined is as follows

> In dealing with statutes such as that involved in this case it is essential that we bear in mind that unless there is some statute which authorizes a refund or the filing of a claim for refund, money cannot be refunded or recovered once it has been paid although levied under the authority of an unconstitutional statute. 51 Am.Jur., Taxation, 1161. (Deleted section underlined.)

Victor Chemical Works, supra, at 562.

The "statutes such as that involved in this case" noted above refers to taxing statutes. The sentence following the above quote goes further to state that

> The recovery of illegally extracted taxes is solely a matter of governmental grace.

Id. at 562.

The power to tax is a fundamental power of the State. "The State possesses inherent power to tax, as a right and an attribute of sovereignty". 31 Fla.Jur., Taxation, 20. Victor Chemical Works involved a Taxing Statute which specifically provided for a refund or a claim of refund. There the Court distinguished the "non-claim" aspect of the taxing

statute from a general Statute of Limitations and held that where there is a specific provision for a claim of refund within a time period, such a claim must be made within the period specified.

The present case involves neither a taxing statute nor a "non-claim" period of time in which to make a claim for a refund. In contrast to a case involving the fundamental authority of government to tax, the instant case involves the equally fundamental right of citizens to be protected from the unconstitutional taking of their property without just compensation. The Victor Chemical Works case does not apply on its facts or on the law to the instant case. There is no authority for the proposition that a special statute is required before unconstitutionally taken property can be refunded to its rightful owners.

In summary of their argument, the Plaintiffs state that it should be presumed that the United States Supreme Court and the Florida Supreme Court knowingly refrained from specifying that Webb's was an exception to the general rule requiring retroactive application. The circumstances of Webb's do not meet the Supreme Court's criteria for "Prospective Only" application in that such application would retard the operation of the principle forcibly stated in Webb's that the "Taking Clause of the Fifth Amendment stands as a shield against the arbitrary use of governmental power". Furthermore, the balance of

"injustice or hardship" would weigh more heavily on the side of the citizens whose property was unconstitutionally taken if Webb's is not applied retroactively.

## CONCLUSION

The final Order dismissing the action with prejudcie should be reversed with instructions to the Trial Court that the United States Supreme Court's decision in Webb's is retroactive and that the Appellants' cause of action accrued on the date the Webb's decision was decided.

Respectfully submitted,

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished to ALEXANDER COCALIS, Deputy General Counsel for Broward County, Room 248, Broward County Courthouse, 201 Southeast Sixth Street, Ft. Lauderdale, Florida 33301, by mail, this 28th day of January, 1982.

POWELL, TENNYSON & ST. JOHN, P.A.
Attorneys for Appellants
325-C Clematis Street
West Palm Beach, Florida 33401
Telephone: (305) 659-5133

By /s/ David St. John
DAVID ST. JOHN